Program Funding and Fiscal Law

FY 2000 Air Force Systems and Logistics Contracting Course

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Source of Funds - The Congress

- Article 1, Section 9, U.S. Constitution grants exclusive authority to the Congress to
  - appropriate money
  - determine what it may be spent on
  - specify how long it remains available

Source of Funds

- Limits on Congressional spending authority
  - pursuit of the general welfare
  - conditions imposed must relate to the expressed goal
  - intent to impose conditions must be clear
  - action must not be prohibited by an independent constitutional bar

Appropriation Acts

- Actual source of funds for expenditure
- Contains limited reprogramming authority
- Selectively withdraws unobligated balances of prior fiscal year appropriations

Appropriation Acts

- Line item funding
- General funding
  - Earmarking
- May function as both authorization and appropriation when authorization act hasn't passed first

Time Limits

- Annual funds are O&M and MILPER
- Multiple year funds are Procurement, RDT&E and MILCON
- Appropriation Act specifies according to purpose
- Three stages of life
  - Available to fund new awards
  - To fund upward adjustments only (expired)
  - Unavailable for any purpose (closed)

Time Limits

- Special cases
  - Available until expended (e.g., 10 U.S.C. 2703 - Environmental restoration account)

Time Limits

- Initial obligation
  - Requires **binding** contract prior to expiration
  - Standard for a binding contract set by statute (31 U.S.C. 1501) and GAO precedent (34 Comp. Gen. 418)
  - O&M (3400) must be obligated during current fiscal year
  - RDT&E (3600) can be obligated for 2 years from initial availability
  - Procurement (3080, 3020, 3010) can be obligated for 3 years from initial availability.

AFR 65-601, Vol. 1
(Contingent Liabilities)

- 6.2.2. Don't record obligations as hedges against future contingencies; these aren't valid obligations. Financial Management and Comptroller (FM) and Defense Accounting Officer (DAO) offices should rescind these obligations as part of certification procedures at the end of each fiscal year. See requirements for recording obligations in DFAS-DE Regulation 170-8, Accounting for Obligations, which are unchanged.

Funding Contingent Liabilities

- Cost reimbursement contracts
  - Obligate total estimated costs (including fixed, base or target fee)
- Obligate target or billing price at date of award
- Fixed Price Incentive contracts
- Adjust obligations to reflect above or below target projections throughout performance

Time Limits

- "Upward adjustments" to obligations after expiration
  - Term of art referring to non-discretionary liabilities which accrue from initial award and represent maturing contingencies, e.g., valid CDA claims for other than new work, EPAs, in-scope changes & certain adjustments of overhead rates on cost-type contracts

Time Limits
The Bona Fide Need Rule
31 U.S.C. 1502

- Most appropriations have a fiscal year identity
- Requirements are tied to a time period in which needed for use or employment
- Obligating current year money for future year requirements violates the bona fide need rule and may be construed as contracting in advance of appropriations

Severability

- Determined according to
  - whether the need is of a continuing nature, arising from “day to day, or month to month, and the government cannot, in the absence of specific legislative authorization, be obligated for such services by any contract running beyond the fiscal year” (33 Comp. Gen 92)
  - whether interim deliverables are complete and useful end products
- Contract type not conclusive (B-235678, July 30, 1990))

Split Funding of Contracts

- Most contracts for severable services require fiscal year options to avoid contracting in advance of appropriations
- Services contracts are either “severable” or “non-severable” (entire)
  Statutory exceptions include use of single fiscal year to fund 12 months worth of services requirements (formerly limited to maintenance of tools and equipment, depot maintenance, etc.)

RDT&E FUNDING

- DoD budgets and funds contracts for Research & Development incrementally
- Practice is not based on statute - officially acknowledged by GAO in 55 Comp. Gen. 812
- Practice does not imply inherent severability of research and development engineering services
- Normal rule for services is to fund to completion using appropriation current at time of award.
  - Non-DoD agencies have been unsuccessful in attempts to qualify contracts for “studies” as incrementally funded R&D efforts

Full Funding Policy

- Strong Congressional support
- Applies specifically to Procurement appropriations - dates to 1951
- Prohibits split funding of investment items
- Instructive GAO opinion - 55 Comp. Gen. 812 (1976)

Time Limits - The Bona Fide Need Rule

- Prior to canceling, focus is on obligation - not expenditure
- After canceling, obligations still tracked by fiscal year
- unliquidated obligations must be paid out of current year funds

Time Limits - Closing of Appropriations

- Unless otherwise provided by statute, all appropriations close within 6-8 years from initial availability (5 yrs in expired status)
- “Closed” or “canceled” means **unavailable for any purpose**, including expenditure
- Current year funds are available to pay late arriving invoices up to 1% of Total Obligation Authority (TOA)

Bona Fide Need Rule Exceptions

- Advance procurement - Long Lead Time
- 10 U.S.C. 2410a - single year funding of severable requirements for continuous 12 month period
- Spares procurement - “full pipeline”
- Economic quantity procurement under multiyear contract authority (10 U.S.C. 2306b and 2306(g))

Weapon System Modifications

- How do you budget for block changes?
  - Variables similar to PDM
    - projected ability of customer to input assets for modification influences when you request budget authority
    - production lead time for parts
  - Identification of bona fide need encompasses more than just approval of design change
  - Can’t apply excess obligated funds which expired prior to approval of change to fund requirement
  - Multiple year funding still subject to bona fide need rule

Weapon System Modifications

- Where economies of scale warrant, pursue multiyear contract authority
- Modification Kits may contain long lead items
- In the absence of congressional authority for a “buy out” in a single fiscal year - must use fiscal year lot buy options

Purpose

- **31 U.S.C. 1301(a)**: "Appropriations shall be applied only to the objects for which the appropriations were made, except as otherwise provided by law."
  - Where two appropriations are available - utilize the more specific.
  - Determine whether a specific limitation or condition on obligation has been imposed by statute on your program or project, e.g., earmarked amount in Authorization Act, availability contingent upon test results, etc.

Determining Proper Purpose

- Must be for a particular statutory purpose, or necessary and incident to proper execution of the general purpose of the appropriation
- The expenditure must not be prohibited by law
- The expenditure must not be otherwise provided for

The Necessary Expense Rule

- Food and Clothing for Government Employees Generally Not A Necessary Expense
- Exceptions Include
  - Mission-essential organizational clothing or equipment (issue items)
  - Meals where essential to facilitate mission activity (refreshments at awards ceremony - 65 Comp. Gen. 738)
- Litigation expenses
  - Award of protest costs comes out of same appropriation or fund which supports the requirement

The Necessary Expense Rule
Litigation expenses (cont.)

- Reimbursement of the Judgment Fund
  - Where **no other source of funds is available** pay out of the permanent indefinite appropriation known as the **Judgment Fund**
  - Judgment Fund **must be reimbursed** out of agency appropriation of the same type which was used to fund the program or requirement in litigation, but must be of the fiscal year which was current when the judgment was entered or a court approved negotiated settlement was reached.

Purpose

- Engineering services performed under contract may be a requirement of O&M, RDT&E or Procurement
- Proper source of funds determined by life cycle of the end item and desired result
  - Increase in performance envelope = RDT&E
  - Correction of design defects **during production** phase = procurement

Purpose

- Any design improvement which does not increase performance occurring after production line closes = O&M

Purpose Statute Violations

- When does transition from EMD to Production occur?
  - Initiation of configuration control not determinative
  - Acceptance or rejection by user following IOT&E highly relevant.
  - Attainment of essential functional capability

Amount

- Authorization Act sets program limits
- Appropriation Act provides the money
- Antideficiency Act makes it a criminal offense to deliberately incur a liability in the absence of available funds to cover the liability
- Exception: Contract Authority Under 41 U.S.C. 11

Innovative Contracting

Fiscal Issues

- Matching the creation of a liability with the obligation of funds
- Rules on funding contingent liabilities
- Line item structure of contracts
- Long term lease of facilities
- Acceptance of Goods or Services “In-Kind”
- Depositing refunds or settlements in current accounts

Matching Liabilities And Appropriations

- Incremental Funding - no statutory authority
- Can’t create a liability w/o a proper source of funds
- Severability of services is still a relevant consideration, notwithstanding 10 USC 2410a
- Multiyear contract authority in 10 USC 2306(g) conditioned on high level determinations
- Can’t “soak up” excess obligated expired year funds by applying against new requirements

Lean Logistics

- Reducing cost and delivery time are imperatives - statute now constrains overhead for inventory control points at 8% of net sales after FY 2000
- Political risks associated with selection of contract type
- Role of contract type in timing of funds obligation (31 U.S.C. §1502(a))
  - Is there an enforceable obligation to perform?
  - What is the nature of the performance called for?

Logistics Workload
P.L. 105-261

- Prime Vendor Contracts for Depot Level Maintenance and Repair
  - Must give Congress a report plus 30 days before awarding a prime vendor contract for depot level maintenance or repair
  - report must include information related to the specific contract to be awarded
  - report must address
    - competitive procedures used
    - analysis of costs and benefits demonstrating long term savings to the Government

Fiscal Issues for APF Activities

- Purpose Statute Violations
- Miscellaneous Receipts Statute
- Bona Fide Need Rule
- Reprogramming

Miscellaneous Receipts 31 U.S.C. 3302

- Generally, an activity that receives *appropriated* funds for its operation can't augment its budget authority by earning revenue on sales to the private sector or other departments or agencies
  - Private sector sales must not include factor for overhead recoupment
  - Sales to other Government agencies (outside DoD) must recover all costs

Unlawful Augmentation of Appropriations

- Definition
  - Collecting funds from outside sources to supplement congressional budget authority without prior statutory authorization
- Common augmentation problems
  - Economy Act or Project Order Statute transactions used to generate **revenue** versus recover cost

Augmentation

- Examples (cont.)
  - Accepting a loan of another agency's personnel to perform your own mission
  - Accepting gifts of liquid assets in the absence of a gift statute covering your agency
  - Accepting reimbursement from another federal agency or military department for loss, damage or deterioration of your agency's property caused by officers or employees of the reimbursing entity.

Augmentation

B-195347, B-195348, MAY 26, 1982, 61 COMP.GEN. 419

"The [Economy] act does not, however, authorize a federal agency to reimburse another agency for services which the latter is required by law to provide and for which, as part of the providing agency's mission, it receives appropriations. 16 Comp.Gen. 333 (1936); 17 id. 728 (1938); 33 id. 27 (1953); B-192875; January 15, 1980. A contrary interpretation would compromise the basic integrity of the appropriations process itself."

Augmentation

"Under the doctrine of separation of powers, Congress, and Congress alone has the 'power of the purse.' When Congress makes an appropriation, it also establishes an authorized program level. To permit an agency to operate beyond the level that it can finance under its appropriation with funds derived from another source would be a usurpation of the congressional prerogative."

Augmentation

- Wither “world-class business practices?”
  - “31 U.S.C. 628 [now 1301(a)] is not overcome merely because the proposed expenditure would result in substantial savings to the government” (B-143536, August 15, 1960).

Exception to 31 U.S.C. 3302
10 U.S.C. 2667 (d)(1)(A)

- Allows retention in special Treasury account of 50% of lease proceeds for use by the military department , *subject to appropriation*, for:
  - facility maintenance and repair; or
  - environmental restoration
- Allows retention in special Treasury account of 50% of lease proceeds for use by the military installation where the leased property is located, *subject to appropriation*, for:
  - facility maintenance and repair; or
  - environmental restoration

Additional Legislative Relief

- Sec. 351 of P.L. 105-85, FY 98 DoD Authorization Act, Sale of Air Pollution Emission Reduction Incentives
- Sec. 831 of P.L. 105-85 modifies the traditional rule on funding judgment awards with appropriations which are current when the judgment is rendered.
  If judgment is that ***government claim and withholding*** of payment is unsupported, the withheld funds can now be used to satisfy the judgment, even though no longer “current”.

Revolving Funds and Air Force Working Capital Funds

- Fund is replenished through charges to customers which incorporate overhead costs (except construction) as well as direct charges
- Can produce a violation of the ADA if obligations exceed cost authority (31 U.S.C. 1517) or if disbursements are made in excess of the Air Force cash balance available, or capital obligation authority

Fiscal Issues for Working Capital Funds

- Relevance of Augmentation
  - Generally not a problem since WCFs allowed to earn a profit
  - Profit-making opportunities limited to serving authorized customers
  - Revenues from sales to general public are miscellaneous receipts
- Source of funds for capital equipment

Loss of Flexibility - Limitations on Advance Billing

- Advance billing
  - Common in Project Order and Economy Act transactions
  - Does not stop the clock from running on expiring funds if work on the order cannot begin within a “reasonable time” after receipt
  - DoD WCFs now under severe constraints
    - Increased cash balances in DoD working capital funds by end of FY 99 must exceed FY 98 year end balances by $1.3 million (P.L. 105-261, Sec. 1007 and P.L. 105-262, Sec 8146(a))
    - USD(C) intervention required if unbudgeted losses threaten accomplishment

Spare Parts Funding

- Spare parts fall into two categories and two types (Each category contains both types)
- **Initial Provisioning** - first category
  - All spare parts needed to sustain a weapon system throughout initial period of operation
  - Unpriced Provisioned Item Orders (PIO) not subject to 50% cap on funding for Undefinitized Contractual Actions (UCA) (10 U.S.C. 2326(b)(5))

Provisioning

- The two types of spares are investment and expense
  - Investment means high dollar value unit price/reparable items (presently $100K)
  - Expense means under $100K in unit price OR non-reparable regardless of initial cost

Provisioning

- All initial spares, irrespective of unit cost, are ultimately funded by the customer's procurement appropriations
  - For any expense type items supplied to make up a PIO for **initial** spares, customers of Supply Management Business Area (SMBA) reimburse the fund using their procurement appropriations
- **Exception**: certain classified programs (See AFR 172-1, para. 18-1; AFI 65-601, para. 18.13.2)*

Funding of Other Spare Parts

- **Replenishment**
  - Spares required to re-stock inventory for support of the weapon system **after** period of initial operation
- Subject to normal rules for definitizing UCAs
  - If unpriced delivery order is not definitized until following fiscal year, completion funding is with later year dollars. (B-197274, Sep 23, 1983)

Simplified Acquisition & "Bulk Funding"

- A term of art used in FAR Part 13:
  "13.003 Policy.

(a) Agencies shall use **simplified acquisition procedures** to the maximum extent practicable for all purchases of supplies or services not exceeding the simplified acquisition threshold (including purchases at or below the micro-purchase threshold).

"13.101 General.

...(b) In making purchases, contracting officers should--

...(4) Use **bulk funding** to the maximum extent practicable. Bulk funding is a system whereby the contracting officer receives authorization from a fiscal and accounting officer to obligate funds on purchase documents against a specified

Simplified Acquisition & “Bulk Funding”

lump sum of funds reserved for the purpose **for a specified period of time** rather than obtaining individual obligational authority on each purchase document. Bulk funding is particularly appropriate if numerous purchases using the same type of funds are to be made during a given period.” (emphasis added)

“Bulk Funding”

- Simplified Acquisition does not apply if an agency can meet its requirement using--
  - (1) Required sources of supply under Part 8 (e.g., Federal Prison Industries, Committee for Purchase from People Who are Blind or Severely Disabled, and Federal Supply Schedule contracts);
  - (2) Existing indefinite delivery/indefinite quantity contracts; or
  - (3) Other established contracts.

“Bulk Funding”

- If you are operating outside the realm of simplified acquisition procedures, bulk funding doesn’t apply
  - Even under simplified acquisition procedures, the rules do not permit advance obligation of funds ***in excess of*** projected requirements of the current fiscal year
  - Nearest parallel is Service Contract twelve month continuous funding exception

Risks In Inappropriate Application of Bulk Funding

- Initial obligation (actual delivery order) won't occur until after funds have expired
- Current year funds (at time of releasing a delivery order) must be found to cover the corrective entry
- The longer you wait, the less likely enough unobligated budget authority will be found to cover the corrective entry - result is a probable violation of the Antideficiency Act

Transfer and Reprogramming Authority

- Authority to transfer funds up to a ceiling amount between appropriations exists at SecDef (e.g., Defense Modernization Account), when authorized by statute
- Authority to Reprogram funds between accounts of the **same appropriation** exists at SAF

Reprogramming

- Four Levels
  - Prior Congressional Approval
  - Congressional Notification
  - Internal
  - Below Threshold
- Can’t use for:
  - unauthorized projects or programs
  - projects or efforts specifically denied by Congress
  - To initiate projects of major scope or base realignment actions

Reprogramming

- Ballistic Missile Defense (RDT&E) divided into 12 specific program elements for budget purposes (P.L. 105-261, Sec. 235 - adding Sec 223 to Title 10)
  - Theater Missile Defense and National Missile Defense Major Weapons System Programs must be identified to program elements and funds ***may not be reprogrammed.***

Fiscal Issues in Partnering

- Scope of authorized partnering activities
  - Purpose statute may be violated if appropriated funds are obligated in support of unauthorized enterprises
  - What are authorized enterprises
    - Can’t compete against private sector w/o statutory authority

Fiscal Issues in Partnering

- Manufacturing Technology - 10 U.S.C. 2525 (Amended by P.L. 105-261, Sec. 213)
  - Cost sharing between Gov't and industry remains the rule
  - Industry share determined through competition
  - No specifics concerning weight to be given to cost share ratio in selecting a project for funding

Fiscal Issues in Partnering

- Contracts having two-to-one cost contribution ratio relaxed from mandatory 25% of funds annually available for the Program to *goal* of at least 25% of funds available
- Authority to determine necessity of 100% government funding due to lack of commercial application, etc., may be delegated no lower than Under Secretary of Defense for Acquisition and Technology or Service Acquisition Executive as appropriate

Logistics Workload

- FY 99 DoD Authorization Act amended **10 U.S.C. 2460** - Definition of depot-level maintenance and repair:
  "(a) In general.--In this chapter, the term 'depot-level maintenance and repair' means (except as provided in subsection (b)) material maintenance or repair requiring the overhaul, upgrading, or rebuilding of parts, assemblies, or subassemblies, and the testing and reclamation of equipment as necessary, regardless of the source of funds for the maintenance or repair [*or the location at which the maintenance or repair is performed*]." (Sec 341)

Sources of the Law

- AFR 170-8 Accounting for Obligations
- AFR 170-13 Accounting for Commitments
- AFI 65-601, Vol.1 - Budget Guidance and Procedures
- GAO Redbook - Principles of Federal Appropriations Law (3 Volumes)
- DoD 7000.14-R (Multi-volume regulation)
- Comptroller General Opinions
- Titles 31, 41 & 10, U.S. Code

ADA Violations

- Don’t be too quick to declare them
- Follow proper procedures
  - DOD 7000.14-R, Vol. 14
    http://www.dtic.mil/comptroller/fmr/14/index.html
- Understand they are serious matters
- Conduct thorough fact-finding
- Notify your MAJCOM/FM when you suspect one has occurred
- Train your people in the ADA and how to investigate potential violations